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### Business Planning as it Should Be: Why Aldman Should be the Standard when Interpreting the Work Product Doctrine

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# **BUSINESS PLANNING AS IT SHOULD BE: WHY ADLMAN SHOULD BE THE STANDARD WHEN INTERPRETING THE WORK PRODUCT DOCTRINE**

*Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.<sup>1</sup>*

## **I. INTRODUCTION**

Jeffrey Smith, Chief Financial Officer of Davidson Enterprises, recently met with the company's corporate counsel to discuss a corporate merger.<sup>2</sup> Davidson, a software developer, and Computersoft Company have been contemplating a merger since the companies co-developed a revolutionary operating system. Davidson is seeking such a merger to tap into Computersoft's strong software distribution system. Davidson proposed a buy-out of Computersoft which, Smith indicated, will result in a sizeable tax loss. Davidson wishes to recoup this loss. During this conversation, Smith explained that the Internal Revenue Service ("IRS") has audited Davidson annually since the software company's founding in 1970. The corporate attorney knows that the IRS always audits refund claims beyond a certain dollar amount. This refund will surpass that threshold. Smith asked Davidson's corporate attorney to determine how the IRS will likely approach the problem. Smith requested a memorandum that details whether Davidson should execute a merger or form a partnership. He also wanted to know what issues might come up in court in the event that the company completes the merger. Finally, Smith wanted to know how the company could fend off any attack by the IRS. Smith left the corporate attorney's office and the legal department immediately went to work.

After delivering the memorandum containing everything that Smith requested, Davidson merged with Computersoft. Soon thereafter, the IRS filed suit to block the sizeable refund that was a result of the losses incurred during the deal. During the initial discovery hearing, the IRS asked for every document that applied to this merger. Davidson's attorneys turned over every fact-oriented document, but withheld the

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<sup>1</sup> Hickman v. Taylor, 329 U.S. 495, 516 (1947).

<sup>2</sup> This hypothetical was conceived entirely by the author and utilizes fictitious names.

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memorandum that they created for Smith and Davidson claiming that it was protected by the work product doctrine. The fact is, because there is uncertainty surrounding the work product doctrine and because this memo was not prepared solely for litigation, the attorneys could possibly be ordered by the court to turn over what will become Davidson's trial strategy. The court's ruling will depend on where this hypothetical takes place. If the court is not in one of the federal districts subscribing to the broader reading of the work product doctrine, the IRS will soon know how Davidson Enterprises plans on defending itself in this action.<sup>3</sup>

Attorneys, judges, and other scholars have criticized the scope of the work product doctrine both before and after the codification of Federal Rule of Civil Procedure 26(b)(3)<sup>4</sup> in 1970.<sup>5</sup> Judges and academics alike

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<sup>3</sup> Since the decision handed down in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), five other circuits, aside from the Second Circuit, have determined that the standard for the work product doctrine protects documents prepared "because of" litigation. *Circuit Split Roundup*, 66 U.S.L.W. 2597 (1998). The First, Fifth and the Ninth Circuits have clearly come down with a more narrow holding that the item sought to be protected must have been prepared "primarily or exclusively to aid in litigation." *Id.* No dual purpose is allowed. *Id.*

<sup>4</sup> Fed. R. Civ. P. 26(b)(3) states that:

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need.

FED. R. CIV. P. 26(b)(3).

The Federal rule of Criminal Procedure similarly states:

[T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses . . .

FED. R. CRIM. P. 16(a)(2).

Although this rule cites to what is not discoverable by the defendant, Fed. R. Crim. P. 16(b)(2) is a reciprocating rule dealing with what is not discoverable by the government. This Note will not deal with the criminal rule.

<sup>5</sup> *Discovery Procedure Symposium*, Comments Before the 1946 Conference of Third United States Circuit Court of Appeals, reprinted in 5 F.R.D. 403 (1946) [hereinafter, *Discovery Symposium*]. Throughout the Symposium, various attorneys, and even a Senator, spoke for and against the proposed discovery rule. *Id.* The portion of the rule that eventually was submitted, but not included in the final rule, reads as follows:

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation of trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing

have championed arguments for both broad and narrow readings of the rule even during the rule's formulation.<sup>6</sup> Although numerous judges and attorneys in the United States have asserted various arguments since the 1940s, debate on this topic is not just a twentieth century phenomenon. In fact, similar debates started in the courts of England in the late 1800s<sup>7</sup> and continued in Canadian courts during the 1930s.<sup>8</sup> Thus, confusion abounds throughout various court systems as to the status of the work product doctrine.

Despite the confusion, this Note demonstrates that the interpretation of the work product doctrine as laid out in *United States v. Adlman*<sup>9</sup> is the proper standard for the Federal Court System because it is the standard that scholars and lawyers initially introduced in 1947.<sup>10</sup> This Note shows that a protected memorandum can be prepared with the dual purpose of planning a business decision and planning for future litigation without offending the premise of the work product doctrine because such a document can contain a lawyer's mental impressions and strategies; items that the rule is designed to protect.<sup>11</sup> Because Rule 26(b)(3) does not specifically limit work product protection to documents *solely* prepared for litigation, the *Adlman* standard is the correct interpretation

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his claim or defense or will cause him undue hardship or injustice.

The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or . . . the conclusions of an expert.

Advisory Committee on Rules for Civil Procedures, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, *reprinted in* 5 F.R.D. 436, 456-57 (1946) (alteration in original).

As shown by the language in the original proposal, the work product doctrine was never meant to protect only those materials prepared solely for trial. It encompasses materials prepared in anticipation of litigation. *Id.* Congress finally codified Rule 26(b)(3) in 1970. FED. R. CIV. P. 26(b)(3) (Advisory Committee's note). The committee indicated that it created the rule to eliminate the "good cause" requirement as explained in Rule 34 and in *Hickman v. Taylor*. *Id.* See also 28 U.S.C.A. § 2072(a) (West 1992). This statute gives the United States Supreme Court the power to proscribe the rules of procedure used in the federal court system. *Id.*

<sup>6</sup> See *Discovery Symposium*, *supra* note 5, at 424, 430. This symposium, which first promulgated the language found in Rule 26(b)(3), was composed of elected representatives, judges and attorneys. *Id.* at 403.

<sup>7</sup> See *infra* section II.A.

<sup>8</sup> See *infra* section II.A.

<sup>9</sup> 134 F.3d 1194, 1198 (2d Cir. 1998) (stating that the proper reading of the work product rule indicates that protection extends to documents prepared "because of" either expected or existing litigation even if the documents do not have the exclusive purpose of assisting in litigation).

<sup>10</sup> See *infra* section III.

<sup>11</sup> See *infra* section III.

of the rule.<sup>12</sup> The *Adlman* standard allows companies to make business decisions and effectively plan for future litigation simultaneously without offending the purpose of the work product doctrine.<sup>13</sup>

Furthermore, this Note demonstrates why the inflexible, narrow reading of the work product doctrine is no longer feasible.<sup>14</sup> Section II explains the origin of the work product doctrine as it evolved in England and Canada.<sup>15</sup> Section II also discusses the beginnings of the doctrine in the United States and how the seminal case of *Hickman v. Taylor*<sup>16</sup> impacted the creation of Rule 26(b)(3).<sup>17</sup> Further, this discussion explains ordinary work product and opinion work product and how different circuit courts deal with the discovery requests of opinion work product.<sup>18</sup> This Section continues by differentiating the work product doctrine from the attorney-client privilege.<sup>19</sup>

Next, Section III introduces *Adlman* and its broader reading of the work product doctrine.<sup>20</sup> This Section also introduces the narrower standard as explained in *United States v. Gulf Oil Corp.*<sup>21</sup> Section III will also address the current status of the work product doctrine among the U.S. federal circuits.<sup>22</sup> Section III explains the impact that the two standards can have on business planning.<sup>23</sup> Additionally, Section III.B advocates that the federal circuits should adopt the *Adlman* standard because it allows a business to plan for the future without offending the premise of the work product doctrine.<sup>24</sup> Finally, Section IV introduces a proposed judicial test to determine what materials should be protected under the work product doctrine.<sup>25</sup> To fully comprehend why this test is

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<sup>12</sup> See *infra* section III.B.

<sup>13</sup> See *infra* section III.B.

<sup>14</sup> See *infra* section III.A.

<sup>15</sup> See *infra* notes 30-43 and accompanying text.

<sup>16</sup> 329 U.S. 495, 510-11 (1947). The *Hickman* Court held that notes taken by an attorney during witness interviews are protected as the work product of the attorney since he needs to "prepare his legal theories and plan his strategy without undue and needless interference." *Id.*

<sup>17</sup> See *infra* notes 49-66 and accompanying text. See also *supra* note 4 for the text of Rule 26(b)(3).

<sup>18</sup> See *infra* notes 83-90 and accompanying text.

<sup>19</sup> See *infra* notes 98-104 and accompanying text.

<sup>20</sup> See *infra* notes 147-84 and accompanying text.

<sup>21</sup> 760 F.2d 292 (Temp. Emer. Ct. App. 1985). See *infra* section III.

<sup>22</sup> See *infra* notes 133-84 and accompanying text.

<sup>23</sup> See *infra* notes 133-84 and accompanying text.

<sup>24</sup> See *infra* notes 162-85 and accompanying text.

<sup>25</sup> See *infra* section IV.

feasible and not offensive to Rule 26(b)(3), however, there must be an understanding of the rule's foundation.

## II. HISTORY OF AND RATIONALE BEHIND THE WORK PRODUCT DOCTRINE

Congress and the courts have incorporated several changes in the work product doctrine since the seminal case of *Hickman*.<sup>26</sup> Since the doctrine's formal introduction into federal procedure in *Hickman*, and its codification in Rule 26(b)(3), judges and lawyers have grappled with how broadly to read the phrase "in anticipation of litigation."<sup>27</sup> In order to understand the doctrine, an explanation of the doctrine's origin is warranted. This Section explains how jurisdictions outside the United States have dealt with work product questions.<sup>28</sup> This Section also introduces *Hickman* and explains how this case influenced the way in which courts and attorneys interpret the work product doctrine.<sup>29</sup>

### A. The Work Product Doctrine as Applied by Other Court Systems

English courts, as early as 1881 with *Wheeler v. LeMarchant*,<sup>30</sup> recognized that some aspects of an attorney's work needed to be protected.<sup>31</sup> In *Wheeler*, the plaintiff sought to discover some letters that

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<sup>26</sup> See *infra* section II.B.1. for a discussion of *Hickman v. Taylor*. Although the text of Rule 26(b)(3) has not changed, courts have used various interpretations of the rule when ruling on discovery questions. See *infra* section III. See *supra* note 4 for the text of the work product doctrine, Rule 26(b)(3).

<sup>27</sup> EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 311-12 (3d ed. 1997). Epstein points out that cases have introduced standards ranging from an attorney having to "envision litigation", *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 151 (D. Del. 1977), to an attorney needing to have concrete facts that would show that the situation would "likely lead to litigation", *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980). Such discrepancies in verbiage lead to confusion in the rule. See *infra* section III.

<sup>28</sup> See *infra* notes 30-48 and accompanying text.

<sup>29</sup> See *infra* notes 49-66 and accompanying text.

<sup>30</sup> 17 Ch. D. 675 (1881).

<sup>31</sup> See *id.* at 681. In looking at what may be protected under the newly created work product doctrine, the court noted:

[D]ocuments are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence.

*Id.*

were passed between the defendant and his solicitor.<sup>32</sup> LeMarchant, the defendant, subsequently filed an affidavit seeking to protect the letters from discovery by Wheeler, the plaintiff.<sup>33</sup> LeMarchant's solicitor prepared the letters, which contained notes, opinions, and other accounts, for the defense of another related action.<sup>34</sup> The *Wheeler* court determined that, in general, documents containing legal advice that are created for litigation are protected from discovery.<sup>35</sup> It said that courts created and cultivated this rule to allow a person to consult an attorney and safely obtain legal advice without the fear of having to turn the information over to an adversary.<sup>36</sup>

Another English court in *Lyell v. Kennedy*<sup>37</sup> further clarified the decision in *Wheeler*. In *Lyell*, Kennedy had answered some interrogatories as requested by Lyell.<sup>38</sup> Lyell felt that the answers were insufficient and should be expounded upon.<sup>39</sup> Kennedy balked at this because he felt that further answers would reveal protected information.<sup>40</sup> The court held that Kennedy's answers to the interrogatories were sufficient and nothing more needed to be revealed.<sup>41</sup> The *Lyell* court explained that a party to the case did not have to reveal briefs that were prepared by an attorney for the purposes of trial because insight into the solicitor's mind may be gained if such items were revealed.<sup>42</sup> The court in *Lyell*, in determining whether the work product of the attorney should be

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<sup>32</sup> *Id.* This was an action requesting specific performance of a building contract. *Id.* at 675. Defendants were to grant a lease of certain land to the plaintiff upon the plaintiff's constructing of certain buildings. *Id.* Defendants also were to advance money to the plaintiff as the buildings progressed. *Id.*

<sup>33</sup> *Id.* at 681.

<sup>34</sup> *Id.* at 675-76. The related case dealt with the administration of an estate. *Id.* at 675. The plaintiff requested documents from that action dealing with the estate and documents dealing with this action also. *Id.*

<sup>35</sup> *Wheeler*, 17 Ch. D. at 681.

<sup>36</sup> *Id.* at 682. Although this seems to indicate that advice falls under the attorney-client privilege, once the communications become documented and are of the nature of advice, such documents become covered by the work product doctrine. See *infra* notes 98-104 and accompanying text for a discussion on the attorney client privilege.

<sup>37</sup> 27 Ch. D. 1 (1884).

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 11-12.

<sup>41</sup> *Id.* at 26-27.

<sup>42</sup> *Lyell*, 27 Ch. D. at 26-27.

protected, laid the groundwork as to what documents will be protected under the work product doctrine as determined in *Hickman*.<sup>43</sup>

The English courts, however, were not the only courts to recognize the importance of protecting certain information an attorney gains during trial preparations.<sup>44</sup> In 1939, a Canadian court decided *McCart v. McCart*.<sup>45</sup> In *McCart*, a husband in a divorce action appealed the dismissal of a discovery motion.<sup>46</sup> The husband sought discovery of a report that an investigator, employed by the wife, prepared for litigation.<sup>47</sup> The *McCart* court held that documents containing proof to a key element of the case were privileged because they were produced for litigious purposes.<sup>48</sup> These decisions from *Wheeler*, *Lyell*, and *McCart* established a precedent that the United States courts appear to have followed.

## B. *Hickman and Beyond: The Various Interpretations of the Work Product Doctrine in the United States*

### 1. The *Hickman* Decision

Despite England's and Canada's early progress in determining what the work product doctrine protects in their respective legal systems, the United States did not address the work product doctrine until the late 1940s when the Supreme Court decided *Hickman*.<sup>49</sup> In *Hickman*, a tugboat owned by Taylor sank, killing five people including Mr.

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<sup>43</sup> See *id.* See also *Hickman v. Taylor*, 329 U.S. 495 (1947); Harrison G. Kildare, *Discovery Procedure Symposium*, Comments Before the 1946 Conference of Third United States Circuit Court of Appeals, reprinted in 5 F.R.D. 403, 417 (1946) [hereinafter Kildare, *Discovery Symposium*]. Kildare indicated that the same principles laid out in *Lyell* are found in *Hickman*. *Id.*

<sup>44</sup> See Kildare, *Discovery Symposium*, *supra* note 43, at 417.

<sup>45</sup> 3 D.L.R. 777 (1939).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The report that the husband wanted contained the minute details of an adulterous affair that allegedly took place. *Id.* at 777-78.

<sup>48</sup> See *id.* at 778. See also Kildare, *Discovery Symposium*, *supra* note 43, at 417.

<sup>49</sup> See *Discovery Symposium*, *supra* note 5. The *Discovery Symposium* speakers addressed the impact that the *Hickman* case was having on the work of the committee. *Id.* See also Kildare, *Discovery Symposium*, *supra* note 43, at 417. Even Kildare indicated that the rule-makers in the U.S. should take heed of the decisions in *Wheeler*, *Lyell*, and *McCart*. *Id.* The *Hickman* Court even acknowledged the English Courts' development of the concept of protecting documents prepared by counsel with an eye towards litigation. *Hickman*, 329 U.S. at 510 n.9 (1947).



Hickman.<sup>50</sup> As a result of the sinking, Hickman's estate sued Taylor to recover damages under the Jones Act.<sup>51</sup> During discovery, attorneys for Hickman sent Taylor's attorney, Samuel Fortenbaugh, an interrogatory requesting that any notes from interviews conducted in preparation for trial be attached to the interrogatories.<sup>52</sup> Fortenbaugh declined to attach the notes from the interviews because he felt that they were privileged.<sup>53</sup> Fortenbaugh claimed that since the witnesses were still available and that the transcripts from a hearing in front of the United States Steamboat Inspector were available, he did not have to turn over his interview notes.<sup>54</sup>

Although the district court acknowledged that discovery should be limited, the court did not feel that Hickman's request was abusive when it ruled that both the written and oral statements obtained by Fortenbaugh were not protected such that they should be turned over to Hickman.<sup>55</sup> The Third Circuit reversed the lower court's ruling when it stated that the rules of procedure contemplate this type of work by an attorney.<sup>56</sup> The Supreme Court affirmed the Third Circuit's ruling.<sup>57</sup> The

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<sup>50</sup> *Hickman*, 329 U.S. at 498. See also *Hickman v. Taylor*, 4 F.R.D. 479, 480-81 (E.D. Pa. 1945) (providing a detailed factual summary in the district court's background section).

<sup>51</sup> *Hickman*, 4 F.R.D. at 480. See also 46 U.S.C.A. § 688 (West 1975 & Supp. 1999). The Jones Act provides a means of recovery for injury to or death of a seaman. *Id.*

<sup>52</sup> *Hickman*, 329 U.S. at 498-99. The statements that Hickman wanted consisted of Fortenbaugh's (Taylor's attorney) interviews of the tugboat's surviving members and other persons believed to have known something about the accident. See *Hickman*, 4 F.R.D. at 481. These statements were apparently taken after a hearing by the United States Steamboat Inspector regarding the sinking of the tugboat. *Id.*

<sup>53</sup> *Hickman*, 329 U.S. at 498-99.

<sup>54</sup> *Id.* The Court determined that Hickman did not show that denial of this information would unduly prejudice the preparation of his case, nor would denial cause any hardship or injustice. *Id.* at 509. See *infra* notes 115-28 and accompanying text for a discussion on substantial need and undue hardship tests.

<sup>55</sup> *Hickman*, 329 U.S. at 505. The district court said that discovery should not be abused to the point that opposing parties are able to obtain an opponent's theories, impressions, or opinions on the case. *Id.* The Supreme Court indicated that the district court incorrectly based its ruling on Rule 34 which states that the party opposing discovery may be forced to disclose items upon showing of good cause by the requesting party. *Id.* at 502, 505. See also *Hickman*, 4 F.R.D. at 482-83. The district court indicated the need to protect the impressions of an attorney, but it never considered that how an attorney who questions witnesses could give a possible roadmap as to the questioning of an attorney's possible strategy(s). *Id.* at 482-83. The district court held Fortenbaugh in contempt for not complying with the discovery order. *Hickman*, 329 U.S. at 505.

<sup>56</sup> *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945). The Third Circuit introduced the term "work product" during its opinion. *Id.* The Court said that protection should attach to the "results of the lawyer's use of his tongue, his pen, and his head for his client." *Id.*

Supreme Court indicated that because Hickman could find the desired information in a variety of ways, the only plausible reason for the discovery request was to get into the mind of Taylor's attorney.<sup>58</sup> The various rules employed during the trial by the district court to determine what material is discoverable, however, prompted the Supreme Court to note that a specific discovery standard on work product needed to be articulated.<sup>59</sup>

Early in the *Hickman* trial, the courts realized that no clear guidelines existed to determine what materials should be protected.<sup>60</sup> As a result of these uncertainties in this area of discovery, the Third Circuit Rules Committee introduced Rule 30(b), the precursor to Rule 26(b)(3).<sup>61</sup> Although the Supreme Court did not adopt the specific language of the work product doctrine into Rule 30(b) at that time, the Supreme Court introduced, and Congress accepted, similar language into the Federal Rules of Civil Procedure as Rule 26(b)(3) in 1970.<sup>62</sup> The committee that formulated this rule focused on how broadly to construe the scope of

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<sup>57</sup> *Hickman*, 329 U.S. at 514. The Court said that the discovery rules were not developed to open the files and mental processes of lawyers to opposing counsel for an adversary to scrutinize. *Id.*

<sup>58</sup> *Id.* The Court said that the petitioner could find the witness' testimony that was requested of Taylor by looking at the testimony taken before the United States Steamboat Inspectors. *Id.* at 509. Since the testimony was available from an alternative source that Hickman knew of, the request could not be a result of hardship, but a desire to get into the mind of Taylor's attorney. *Id.*

<sup>59</sup> *Id.* at 510-14. The Court indicated that although several of the Federal Rules of Civil Procedure addressed the types of requests of Taylor's attorney, no one rule specifically dictated a particular result. *Id.* at 513-14.

<sup>60</sup> See Samuel B. Fortenbaugh, Jr., *Discovery Procedure Symposium*, Comments Before the 1946 Conference of Third United States Circuit Court of Appeals, reprinted in 5 F.R.D. 403, 408-13 (1946). See also *Hickman v. Taylor*, 4 F.R.D. 479 (E.D. Pa. 1945), *rev'd*, 153 F.2d 212 (3d Cir. 1945) (holding that the interrogatories, which were directed at opposing counsel regarding interviews that opposing counsel secured, do not preclude the requesting attorney from bringing suit to obtain the requested information because this is within the proper scope of discovery).

<sup>61</sup> Advisory Committee on Rules for Civil Procedures, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, in 5 F.R.D. 436, 456-57 (1946). At that time, each circuit was able to introduce rules for procedure as allowed by 28 U.S.C. § 723(c). See *Discovery Symposium*, *supra* note 5, at 403. See also *supra* note 5 for the text that the committee originally introduced.

<sup>62</sup> Congress finally codified Rule 26(b)(3) in 1970. FED. R. CIV. P. 26(b)(3) (Advisory Committee's note). The committee recognized the vexing problems of the discovery rules such that these amendments were an attempt to find compromise. *Id.* Although this Note recognizes that there still are problems with the discovery rules, this Note attempts to only resolve the work product doctrine problem. See *infra* section IV. See also *supra* note 4 for the text of Rule 26(b)(3).

discovery.<sup>63</sup> It recognized the need for adversarial parties to disclose factual material during discovery.<sup>64</sup>

The committee, however, also recognized the importance of protecting one attorney's work from the other so that one attorney is not doing the work for both sides.<sup>65</sup> Thus, from *Hickman* to the formulation of the current discovery rule, the premise behind the work product doctrine is that an attorney, when preparing for litigation, should not have to give up those items that would allow an opposing attorney to piggyback on another attorney's work.<sup>66</sup> The *Adlman* decision is a logical extension of this thought process. *Adlman*, however, did not evolve solely from *Hickman*. It also based its reasoning on rationale promulgated by the Court in *Upjohn Co. v. United States*.<sup>67</sup>

## 2. The Work Product Doctrine Continues to Evolve with the *Upjohn* Decision

The work product rule continued evolving and took another big step with the decision in *Upjohn*. In this case, the Upjohn Company ("Upjohn") conducted an internal investigation of potentially illegal payments to several foreign governments.<sup>68</sup> The company discovered the discrepancies during an audit conducted by its independent

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<sup>63</sup> Maurice Rosenberg, Changes Ahead in Federal Pretrial Discovery, Comments Before the Ninth Annual Postgraduate Conference of the Columbia Law School Alumni Association (Mar. 23, 1968), in 45 F.R.D. 479, 481-93 (1969). Rosenberg indicated that the committee kept two policies in mind when formulating the new work product rule. *Id.* at 492. First, it realized that the adversarial process must be protected despite the need for the free exchange of information between opposing counsel. *Id.* Second, the committee wanted to make sure that both the plaintiff and the defendant prepared independently for trial. *Id.* at 493. See also FED. R. CIV. P. 26(b)(3) (Advisory Committee's note).

<sup>64</sup> See Rosenberg, *supra* note 63, at 493. Rosenberg commented that the court itself has an interest in both a plaintiff's and defendant's counsel doing thorough preparation "for in an adversary system, the sparks of contest illumine the pathway to decision." *Id.*

<sup>65</sup> *Id.* See also Fred A. Freund, Federal Pretrial Discovery: Work Product, Address Before the Ninth Annual Postgraduate Conference of the Columbia School Alumni Association (Mar. 23, 1968), in 45 F.R.D. 493 (1969). Although Freund would modify which materials are discoverable, he still advocates the idea that each attorney should prepare his own strategies free from discovery by an adversary. *Id.* at 498.

<sup>66</sup> See *infra* section III.

<sup>67</sup> 449 U.S. 383 (1981) (holding that the work product doctrine applies to IRS summonses because the summonses request information that is either protected by the work product doctrine or the attorney-client privilege).

<sup>68</sup> *Id.* at 387-88. Company attorneys prepared letters containing a questionnaire in which the attorneys wanted to determine the nature and magnitude of payments by company managers to officials of foreign governments. *Id.* at 386-87.

accountants.<sup>69</sup> Upjohn voluntarily submitted preliminary reports of the investigation, which were based upon employee interviews, to both the Securities and Exchange Commission and the IRS.<sup>70</sup> Subsequently, the IRS initiated its own investigation to determine whether there were any improperly accounted for funds.<sup>71</sup> While conducting this investigation, the IRS sought copies of the employee interviews.<sup>72</sup> Upjohn refused to produce them claiming that the attorney-client privilege and the work product doctrine protected the documents.<sup>73</sup>

The *Upjohn* Court agreed with the company when it held that a corporation's attorneys may invoke the work product doctrine to prevent the disclosure of statements made by employees seeking legal advice because the questioning could reveal the mental process of the attorney.<sup>74</sup> The Court also recognized the various problems that could arise if such recordings were not protected.<sup>75</sup> One problem that the Court noted is that much of what attorneys currently record would probably remain unwritten if the discovery rules were too liberal.<sup>76</sup> The Court also opined that liberal discovery rules would promote laziness by opposing counsel because an opponent's thoughts and strategies would become readily available.<sup>77</sup> If allowed, such invasive discovery rules would demoralize the efficient lawyer and the judicial process would eventually suffer.<sup>78</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Upjohn*, 449 U.S. at 387-88. The IRS wanted copies of the questionnaires as well as notes and memorandums from any interviews conducted in relation to this action. *Id.*

<sup>73</sup> *Id.* at 388. Upjohn claimed work product protection because the notes and memoranda sought by the government would reveal its attorneys' mental processes in evaluating the information gained from the Upjohn employees. *Id.* at 401.

<sup>74</sup> *Id.* at 399-400.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 398. See also *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

<sup>77</sup> *Upjohn*, 449 U.S. at 398-401. See also Sherman L. Cohn, *The Work-Product Doctrine: Protection, not Privilege*, 71 GEO. L.J. 917, 919 (1983). Cohn points out that by forcing the disclosure of an opponent's completed file, much of an attorney's need for personal research and investigation would be eliminated. *Id.*

<sup>78</sup> Cohn, *supra* note 77, at 919. See also ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* 223-28 (3d ed. 1994). Haydock indicates that by protecting an attorney's thought process, the work product doctrine protects the effectiveness of a lawyer. *Id.* at 226. See also Robb C. Adkins, Note, *Protection of Accountant Documents and the Attorney-Client Privilege and Work Product Doctrine: Bernardo v. Commissioner*, 49 TAX LAW. 949, 957 (1996). Adkins indicates that the work product doctrine rightfully protects an

Although many courts realized that the legal profession and the judicial process would suffer if the discovery process became too invasive, courts have not developed a uniform test to limit discovery.<sup>79</sup> Some courts, however recognized that the *Hickman* Court created a balancing test to determine when attorneys may discover certain work product.<sup>80</sup> The *Hickman* Court indicated that courts should balance the systematic interests of an attorney's sphere of privacy against society's interest in ensuring that all parties obtain knowledge of all of the relevant facts of a case.<sup>81</sup> By balancing these interests, opposing counsel would be prevented from making unnecessary intrusions into an attorney's sphere.<sup>82</sup> By balancing both interests, courts will best serve justice. To successfully balance these interests, however, courts must determine what type of work product the opposing attorney is requesting.

### 3. The Fundamental Aspects of the Work Product Doctrine

Through the balancing test introduced in *Hickman*, courts began to acknowledge two different types of work product: ordinary work product and opinion work product.<sup>83</sup> Ordinary work product is the factual information of a case that an attorney or the agent of the attorney discovers.<sup>84</sup> *Hickman*, in particular, found that relevant facts obtained

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attorney from "merely appropriating the work of opposing counsel" such that each attorney determines the appropriate strategy to best serve the client. *Id.* at 954.

<sup>79</sup> See *infra* section III. This section points out two standards in use in the federal courts. See *infra* section III. See also Charles M. Yablon & Steven S. Sparling, *United States v. Adlman: Protection for Corporate Work Product?*, 64 BROOK. L. REV. 627 (1998). The article points out that courts have applied several tests with regard to what gets work product protection. *Id.* Tests include the prospect test, the specific claim or concrete facts test, the more-than-a-remote-possibility test, and the eye toward litigation test. *Id.* This Note will not address these tests.

<sup>80</sup> See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015 (1st Cir. 1988) (ruling that the identification of exhibits to be used during depositions is considered ordinary work product; thus, in the interest of an expedited process, the list of exhibits should be turned over to adversary as the lists do not indicate the mental impressions of opposing counsel). See also Cohn, *supra* note 77, at 943.

<sup>81</sup> *Hickman*, 329 U.S. at 507-11.

<sup>82</sup> *Id.*

<sup>83</sup> See *id.* at 510-12. See also *Upjohn*, 449 U.S. at 401 (indicating that the only time that opinion work product should be discoverable is upon the showing of substantial need of the sought item and that the equivalent of the item cannot be obtained without undue hardship because it deals more with the attorneys mental thoughts and analyses); *In re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988) (holding that opinion work product should only be disclosed upon a showing of extraordinary circumstances).

<sup>84</sup> HAYDOCK ET AL., *supra* note 78, at 226.

during the ordinary investigation of a case are considered ordinary work product and, thus, are more readily discoverable if the opposing counsel has made a showing of "substantial need" or "undue hardship."<sup>85</sup> On the other hand, the *Hickman* Court also noted that courts need to give greater protection to opinion work product.<sup>86</sup> Opinion work product generally involves an attorney's mental impressions, conclusions, opinions, and legal theories.<sup>87</sup> The *Hickman* Court stated that when an attorney puts this type of work to paper, the requesting party rarely will be able to show enough of a necessity that could justify the production of opinion work product.<sup>88</sup> Unlike the *Hickman* Court, other courts have given absolute protection to opinion work product.<sup>89</sup> Despite these different interpretations of opinion work product, the Supreme Court has yet to mandate one standard of protection.<sup>90</sup>

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<sup>85</sup> *Hickman*, 329 U.S. at 511-12. The Court commented that materials that are generally noted as ordinary work product includes written statements and documents that could be used as evidence or for impeachment and statements from witnesses that are either no longer available or reachable with great difficulty. *Id.* Such items may be obtained upon the showing of "substantial need" or "undue hardship." *Id.* Epstein indicates that courts have found a substantial need exists when witnesses are deceased, have faulty memories, or cannot be found or subpoenaed. EPSTEIN, *supra* note 27, at 352. See also *Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 293 (D. Colo. 1979) (holding that undue hardship exists when a plaintiff would have to depose 1,500 witnesses to obtain the same material sought through discovery). This substantial need must be clearly articulated to the court. EPSTEIN, *supra* note 27, at 352. Epstein also says that an analysis for undue hardship generally is based upon the cost a party must pay to obtain the information. *Id.* at 368. However, cost is not the only basis for undue hardship. *Id.*; 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.70(5)(c)-(d) (3d ed. 1999). For an explanation of the substantial need/undue hardship test, see *infra* notes 115-28 and accompanying text.

<sup>86</sup> *Hickman*, 329 U.S. at 512. The court stated that the standards of the profession would suffer if courts allowed discovery of opinion work product. *Id.* at 513. It also indicated that such evidence usually does not qualify as evidence and if you forced an attorney to turn over such work product for impeachment or corroborative purposes, the attorney would become more of a witness than a court officer. *Id.* at 512-13.

<sup>87</sup> EPSTEIN, *supra* note 27, at 370.

<sup>88</sup> *Hickman*, 329 U.S. at 512. See also *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981). The Upjohn Court said that forcing an attorney to disclose notes and memoranda from witness interviews is particularly disfavored because these notes tend to reveal the attorney's mental processes. *Id.*

<sup>89</sup> See *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (stating that notes from an attorney's conversation with a witness are absolutely protected from discovery because the notes reflect so much of what an attorney is thinking). See also *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (holding that an attorney's notes from witness meetings are shielded from discovery).

<sup>90</sup> *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015 (1st Cir. 1988). See also *Allen v. McGraw*, 106 F.3d 582, 607 (4th Cir. 1997) (indicating that opinion work product enjoys nearly absolute immunity from discovery); *Gundacker v. Unisys Corp.*, 151

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Even with the confusion about the types of work product and to what information the work product doctrine applies, courts have regularly ruled that the work product doctrine is not solely applicable to court trials. Courts have held that the doctrine protects items prepared for grand jury investigations,<sup>91</sup> arbitration hearings,<sup>92</sup> and IRS investigations.<sup>93</sup> In addition, courts have ruled that legal memoranda are not the only documents that may enjoy protection. Documents that courts have considered work product include: agendas to meetings,<sup>94</sup> interviews, statements, memoranda, correspondence, briefs,<sup>95</sup> drawings and diagrams,<sup>96</sup> and any other items that disclose a lawyer's thoughts and strategies.<sup>97</sup>

At this point, a distinction should be drawn between the work product doctrine and the attorney-client privilege. The attorney-client privilege is a client's privilege to disclose, and keep others from disclosing, the confidential communications that take place between a client and a client's attorney.<sup>98</sup> Courts have noted that the work product doctrine is both distinct from and broader than the attorney-client

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F.3d 842, 848 (8th Cir. 1998) (holding that opinion work product is only discoverable upon showing a substantial need for the material and the material cannot be obtained without undue hardship); *Nutramax Lab., Inc. v. Twin Lab, Inc.*, 183 F.R.D. 458, 462-63 (D. Md. 1998) (showing the various formulations of tests for opinion work product in the Fourth Circuit alone).

<sup>91</sup> *In re Grand Jury Subpoena*, dated December 19, 1978, 599 F.2d 504, 509 (2d Cir. 1979) (holding that the work product doctrine may attach to grand jury investigations because they are similar to pre-trial discovery). The court noted that several other courts, including one in the Eighth Circuit, had acknowledged that the work product doctrine has been applied to grand jury proceedings prior to this action. *Id.* See also *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973).

<sup>92</sup> *Samuels v. Mitchell*, 155 F.R.D. 195, 200 (N.D. Cal. 1994) (holding that because arbitration is adversarial in nature, documents prepared by or for a party for use in an arbitration hearing, are protected by the work product doctrine).

<sup>93</sup> *Upjohn*, 449 U.S. at 397. The Court explained that because the Federal Rules of Civil Procedure govern IRS proceedings, documents prepared for such hearings may claim work product protection. *Id.*

<sup>94</sup> *In re Ford Motor Co.*, 110 F.3d 954, 966-67 (3d Cir. 1997) (holding that meeting agendas which disclosed material used as part of legal strategy are protected under the work product doctrine).

<sup>95</sup> *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

<sup>96</sup> *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 57 (N.D. Ohio 1953) (allowing for diagrams to be protected by the work product doctrine if they are prepared by counsel for trial).

<sup>97</sup> See EPSTEIN, *supra* note 27, at 305.

<sup>98</sup> BLACK'S LAW DICTIONARY 129 (6th ed. 1990). This privilege protects communications between attorney and client for the purpose of furnishing or obtaining legal advice. *Id.*

privilege.<sup>99</sup> This broader protection is needed so that a lawyer may determine what must be assembled for trial based on these confidential attorney-client communications.<sup>100</sup> Items covered under the work product doctrine manifest the judiciary's desire to protect a lawyer's mental processes, briefs, and other memoranda prepared in anticipation of litigation.<sup>101</sup>

The purpose of the attorney-client privilege, however, is to promote frank, open communications between the attorney and the client.<sup>102</sup> Attorney-client privilege also takes into account that "sound legal advice or advocacy . . . depends upon the lawyer being fully informed by the client."<sup>103</sup> Unlike the work product doctrine where either the attorney or the client may claim protection, the attorney-client privilege requires a client to assert the privilege.<sup>104</sup>

Although the work product doctrine protects a wide variety of documents in a variety of proceedings, few people may assert the protection.<sup>105</sup> Attorneys may freely assert this protection because their work usually is the subject of discovery.<sup>106</sup> Clients<sup>107</sup> and agents acting

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<sup>99</sup> *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975), *quoted in* 6 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 26.70(8) (3d ed. 1998). The Nobles Court indicated that work product is different from the attorney-client privilege. *Id.* See also *North Shore Gas Co. v. Elgin, Joliet & Eastern Ry. Co.*, 164 F.R.D. 59, 61 (N.D. Ill. 1995) (ruling that neither the work product doctrine nor the attorney-client privilege protect documents containing communications not between the attorneys and the employees). See generally Michael Keeley, *The Attorney-Client Privilege and Work Product Doctrines: The Boundaries of Protected Communications Between Insureds and Insurers*, 33 TORT & INS. L.J. 1169 (1998).

<sup>100</sup> CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 5.31 (1995). See also *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

<sup>101</sup> *Id.* See also HAYDOCK ET AL., *supra* note 78, at 222.

<sup>102</sup> HAYDOCK ET AL., *supra* note 78, at 214.

<sup>103</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), *quoted in* ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* 214 (3d ed. 1994).

<sup>104</sup> MOORE ET AL., *supra* note 85, at § 26.70(8). See also EPSTEIN, *supra* note 27, at 298-99.

<sup>105</sup> HAYDOCK ET AL., *supra* note 78, at 223. Haydock notes that the key figure, regarding who may assert the protection, is the lawyer. *Id.* Although he recognizes the fact that the presence of a lawyer is not a requirement, he does indicate that it helps. *Id.* Haydock also notes that the presence of an attorney does not automatically convert materials into protected documents. *Id.* See also MOORE ET AL., *supra* note 85, at § 26.70(1).

<sup>106</sup> MOORE ET AL., *supra* note 85, at § 26.70(1). The rule protects an attorney's preparation for trial while at the same time providing for adequate discovery. *Id.* Both the client and attorney may claim work product protection. *Id.*

<sup>107</sup> See EPSTEIN, *supra* note 27, at 299-300. See also *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977) (holding that a client may assert a work product claim).



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for an attorney, however, may also assert this protection.<sup>108</sup> In general, courts determine whether the work product doctrine applies by determining the content of the document.<sup>109</sup> If the document or memoranda contains the attorney's thought processes and is prepared for use in litigation, courts will likely grant protection.<sup>110</sup> If the document or memoranda is prepared for general business use, however, courts often will not grant protection.<sup>111</sup>

Once an attorney, agent, or client determines that something may qualify as work product, that person must assert that protection is warranted.<sup>112</sup> Then, the person asserting the work product rule has the burden of proving that the rule applies in that case.<sup>113</sup> This is where the split between the circuit courts creates problems. The attorney, or whomever is asserting the protection, must determine whether a particular federal circuit interprets Rule 26(b)(3) in its broad or narrow form. Then, the attorney must tailor the arguments regarding why a particular item should be cloaked with the work product doctrine. If the court accepts these arguments, the burden then shifts to the requesting party who must show that they have a substantial need for the item(s) and that the item(s) cannot be obtained without undue hardship.<sup>114</sup>

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<sup>108</sup> See *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (indicating that an agent, such as an investigator, acting for an attorney may assert the work product privilege in the same manner that an attorney can).

<sup>109</sup> EPSTEIN, *supra* note 27, at 305. Epstein notes that as an attorney puts more mental strategies into the document, the greater the possibility that courts will prevent the attorney's adversary from obtaining the document. *Id.* See also MOORE ET AL., *supra* note 85, at § 26.70.

<sup>110</sup> EPSTEIN, *supra* note 27, at 348-50. This Note argues that the work product doctrine should be uniformly expanded in all of the Federal Circuits to include documents that have a dual purpose. See *infra* notes 187-89 and accompanying text. This Note advocates that judges should attach work product protection to a document created because of pending or reasonably expected litigation; and, but for the pending or reasonably expected litigation, the document would not have been created in that, or a substantially similar form.

<sup>111</sup> EPSTEIN, *supra* note 27, at 348-50. Epstein notes that when determining if the document is prepared for business or non-business purposes, some courts look to see if the document would have been the same had it been prepared by an attorney. *Id.* at 350. See also *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 16 (D. Md. 1980).

<sup>112</sup> EPSTEIN, *supra* note 27, at 300-01.

<sup>113</sup> See *id.*

<sup>114</sup> *Id.* See also *FED. R. CIV. P. 26(b)(3)*; *Hickman v. Taylor*, 329 U.S. 495, 509 (1947); *HAYDOCK ET AL.*, *supra* note 78, at 227.

The Supreme Court in *Hickman* explained the “substantial need/undue hardship” test.<sup>115</sup> The *Hickman* Court indicated that items protected by the work product doctrine may be obtained if an attorney articulates the specific substantial need that they have to discover the requested document and that the same information cannot be obtained without undue hardship.<sup>116</sup> The *Hickman* Court, in particular, stated that a substantial need is often found when requested documents contain those materials that are essential to the preparation of an attorney’s case.<sup>117</sup> Courts have denied production of items under the substantial need prong when the requesting party has only made a claim of general need,<sup>118</sup> has requested documents to make sure that the attorney has “overlooked nothing,”<sup>119</sup> or has requested documents so the requesting party may look for the “smoking gun.”<sup>120</sup> Courts, however, have found that the substantial need test is satisfied when an adverse party obtains information that is essential to the preparation of a case from those who

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<sup>115</sup> *Hickman*, 329 U.S. at 511. The Court identified one instance that may strip an item of its work product privilege. *Id.* It said that when relevant and non-privileged facts are buried in an attorney’s file and those facts are of great importance to the preparation of the adversary’s case, discovery may be necessary. *Id.* The Court, however, still recognized that “discovery, like all matters of procedure, has ultimate and necessary boundaries.” *Id.* at 507. The Court went on to say that not even the most liberal of discovery policies can rationalize unwarranted inquiries into the mind of an attorney. *Id.* at 510. See also EPSTEIN, *supra* note 27, at 289-91.

<sup>116</sup> *Hickman*, 329 U.S. at 509-11. See also MOORE ET AL., *supra* note 85, at § 26.70(5)(b). Moore indicates that even if a requesting attorney meets the substantial need/undue hardship test, the court still must protect against the disclosure of mental impressions, conclusions, opinions, or legal theories. *Id.*

<sup>117</sup> *Hickman*, 329 U.S. at 511. Substantial need may be found when there are statements which give clues to the existence of relevant facts. *Id.* Substantial need may also be found when there is a request for statements which are useful to impeach a witness or to corroborate a statement. *Id.* In addition, although production may be allowed in these instances, courts still should adhere to the general policy against invading the privacy of an attorney’s course of preparation. *Id.* at 511-12.

<sup>118</sup> *United States v. Chatham City Corp.*, 72 F.R.D. 640, 644 (S.D. Ga. 1976) (indicating that the attorneys wanted to subvert the work product doctrine not for a specific need, but for a desire to learn what kind of case that the government had). The *Hickman* Court even indirectly indicated that a specific need must be shown when it said that discovery may be allowed when relevant facts essential to the presentation of a case are needed. *Hickman*, 329 U.S. at 511.

<sup>119</sup> *Hickman*, 329 U.S. at 513. See also *In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979) (indicating that the work product doctrine will probably never be overcome if an opposing attorney is just looking for material to impeach a witness or to corroborate testimony).

<sup>120</sup> *Rodgers v. United States Steel Corp.*, 22 Fed. R. Serv. 2d 324, 326 (W.D. Pa. 1975) (holding that mere hope by the plaintiff to find a “smoking gun” does not require the production of work product material).

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are no longer available due to death,<sup>121</sup> have a faulty memory,<sup>122</sup> or are no longer within the court's subpoena powers.<sup>123</sup> Courts have also held that requesting parties have satisfied the substantial need prong when the witness who provided the needed information is now unavailable due to the witness's hostility toward the requesting party.<sup>124</sup>

Even if a court determines that a substantial need for the information exists, the requesting party still must show that the equivalent information cannot be obtained without undue hardship.<sup>125</sup> When making this determination, courts generally look at the cost to obtain similar information.<sup>126</sup> Courts, however, have held that memory lapses by witnesses can be considered an undue hardship.<sup>127</sup> In general, when courts do look beyond the cost of obtaining equivalent information, they

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<sup>121</sup> *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 976 (E.D. La. 1974) (holding that substantial need exists when the injured party is not alive to give his own account). The *Hamilton* court also noted that in this case, the requesting attorney was only looking for facts and not on a "fishing expedition." *Id.* See also EPSTEIN, *supra* note 27, at 355-58.

<sup>122</sup> *State Farm Fire & Cas. Co. v. Perrigan*, 102 F.R.D. 235, 238 (W.D. Va. 1984) (holding that a plaintiff suffering from amnesia has a substantial need). The *Perrigan* court also noted that the needed statements were taken prior to the time that the insurance company had retained an attorney for this action. *Id.* See also *McDougall v. Dunn*, 468 F.2d 468, 474 (4th Cir. 1972) (holding that substantial need is demonstrated when a witness with valuable information can no longer testify due to amnesia); EPSTEIN, *supra* note 27, at 356. Epstein notes that the faulty memory idea can also apply to forgetful children. *Id.*

<sup>123</sup> *Hamilton*, 395 F. Supp. at 976. This court ordered attorneys to turn over a statement of a witness that was present at the accident site because that witness was out of the country during the discovery process. *Id.*

<sup>124</sup> See *In re Grand Jury Subpoena* dated Dec. 19, 1978, 81 F.R.D. 691, 695 (S.D.N.Y. 1979) (stating that a witness is hostile when the witness refuses to testify without a grant of immunity such that disclosure may be granted). See also *Mitchell v. Bass*, 252 F.2d 513, 518 (8th Cir. 1958) (recognizing that good cause exists such that disclosure should be granted when a witness refuses to testify).

<sup>125</sup> 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2025 (2d ed. 1994). The authors note that generally, if substantially similar information may be obtained by depositions, then the requesting party's discovery request will be denied. *Id.* at § 2025 n.17. But if substantially similar information cannot be obtained via depositions, court-ordered disclosure of the documents is considered justified. *Id.* at § 2025 n.26. See also *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235 (5th Cir. 1982). The cost of obtaining equivalent information is the usual, but not the only, benchmark when determining whether the requesting party would suffer undue hardship. EPSTEIN, *supra* note 27, at 368.

<sup>126</sup> EPSTEIN, *supra* note 27, at 368. See also *Allen v. Denver-Chicago Trucking Co.*, 32 F.R.D. 616, 618 (W.D. Mo. 1963) (holding that witness statements are to be produced since the witness can only be reached with great difficulty and unnecessary expense).

<sup>127</sup> *Xerox v. I.B.M. Corp.*, 64 F.R.D. 367, 382 (S.D.N.Y. 1974) (holding that an attorney must turn over interview notes of a witness to the requesting party if there was poor recollection by the witness at a subsequent deposition).

determine undue hardship based upon the same criteria that are used to determine substantial need.<sup>128</sup>

Although the guidelines behind the work product doctrine might be clear as to what material might be protected, who may claim the protection, and what it takes to overcome the protection, courts employ numerous tests to determine when the doctrine applies.<sup>129</sup> Currently, two main standards are used:<sup>130</sup> the "because of" litigation standard from *Adlman*,<sup>131</sup> and the "in anticipation of litigation" used in *Gulf Oil*.<sup>132</sup> The courts concurrent employment of these two distinct standards have created the current circuit split. The remainder of this Note will explain these two standards and then explain why the broader interpretation of the work product doctrine best promotes justice without offending the premise of the rule.

### III. THE STANDARDS OF THE WORK PRODUCT DOCTRINE AND WHY THE ADLMAN STANDARD SHOULD BE MANDATED IN THE FEDERAL CIRCUIT COURTS

Although courts agree about the generalities behind the work product doctrine, they disagree over how broadly to read Rule 26(b)(3).<sup>133</sup> Currently, the federal courts of appeal are evenly divided on how broadly to read the work product doctrine.<sup>134</sup> Six circuits follow the

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<sup>128</sup> See *supra* notes 117-24, and accompanying text. See also WRIGHT ET AL., *supra* note 125, at § 2025; EPSTEIN, *supra* note 27, at 352-63.

<sup>129</sup> 23 AM. JUR. 2D *Depositions and Discovery* § 53 (1983 & Supp. 1997). This article introduces a variety of formulas that determine the nexus between the creation of material that gets work product protection and the process of litigation. *Id.* The various standards include "substantial probability that litigation will occur and that commencement of such litigation is imminent," or that litigation must be "real and imminent," or the prospect of litigation must be "identifiable," or that litigation should "reasonably have been anticipated." *Id.* See also *supra* note 79. For a discussion on who may assert work product protection, see *supra* notes 105-08 and accompanying text. For a discussion on what types of materials the work product doctrine protects, see *supra* notes 91-97 and accompanying text.

<sup>130</sup> Although other standards are circulated amongst the Federal Circuit Courts, this Note will only focus on the "because of" standard and the "in anticipation of litigation" standard because the majority of the circuits rely on these two tests. See *supra* note 79. This Note indicates some of the tests currently used in the federal courts. *Id.*

<sup>131</sup> *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998) (holding that documents created "because of" litigation enjoy protection under the work product doctrine).

<sup>132</sup> *Gulf Oil*, 760 F.2d at 296 (indicating that only documents prepared "in anticipation of litigation" enjoy protection under the work product doctrine).

<sup>133</sup> See *supra* note 3.

<sup>134</sup> *Id.*

narrow rule promulgated by the Fifth Circuit as discussed in *Gulf Oil*.<sup>135</sup> The six remaining circuits interpret the work product doctrine in the same manner that the Second Circuit does in *Adlman*.<sup>136</sup> The remainder of this Note explains these two standards of the work product doctrine, advocates the adoption of the *Adlman* standard, and finally, introduces model judicial reasoning, based upon the *Adlman* decision, that the federal courts should use to promote continuity among the circuits.<sup>137</sup> First, this Note addresses the *Gulf Oil* standard.

#### A. The Gulf Oil Standard

In *Gulf Oil*, the Company attempted to prevent the U.S. Department of Energy ("DOE") from discovering certain documents.<sup>138</sup> These documents contained legal opinions generated by Gulf Oil's legal counsel for use by the company's accounting firm in an internal audit of the company.<sup>139</sup> The DOE requested these documents for use in its pricing suit against Gulf Oil.<sup>140</sup> The documents contained the attorneys' opinions concerning the financial implications of another lawsuit.<sup>141</sup> The court held that the work product doctrine did not protect these documents.<sup>142</sup> The court relied on a Fifth Circuit case, *United States v.*

<sup>135</sup> Circuits that read the work product doctrine narrowly include the First, Fifth, Sixth, Ninth, Tenth and Eleventh. *Circuit Split Roundup*, 66 U.S.L.W. 2597 (1998). See also *Gulf Oil*, 760 F.2d at 296. This court held that documents should be protected only when *primarily or exclusively* created for litigation (emphasis added). *Id.* Since these documents contained legal opinions about the financial implications of pending litigation, they were prepared for an accounting firm and thus not created in anticipation or principally for litigation. *Id.*

<sup>136</sup> Other circuits, besides the Second, following the broader reading of the work product doctrine include the Third, Fourth, Seventh, Eighth and D.C. circuits. *Circuit Split Roundup*, 66 U.S.L.W. 2597 (1998). See also *Adlman*, 134 F.3d at 1195 (holding that documents containing legal opinions with regard to a potential business merger are protected under the work product doctrine as they were prepared because of existing or expected litigation). This Note does not take into consideration the Federal Circuit's stance.

<sup>137</sup> See *infra* sections III and IV.

<sup>138</sup> *United States v. Gulf Oil Corp.*, 760 F.2d 292, 294 (Temp. Emer. Ct. App. 1985).

<sup>139</sup> *Id.* Along with the documents that dealt with the internal audit, the DOE requested some documents that pertained to a failed merger between Gulf Oil and Cities Service Co. *Id.* Cities prepared various documents for a declaratory judgment action against the DOE. *Id.* The documents contained Cities' attorneys' mental impressions and analyses of the declaratory judgment suit. *Id.*

<sup>140</sup> *Id.* at 294-97. The DOE wanted the documents pertaining to both the internal audit of Gulf Oil and the declaratory judgment action involving Cities Service. *Id.* at 294.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 297. The court said that since the documents were created primarily to satisfy the requirements of the federal securities law the documents were not protected by the work product doctrine. *Id.*

*Davis*,<sup>143</sup> which held that courts must determine whether the "primary motivating purpose" behind the creation of the documents was to assist in pending or impending litigation.<sup>144</sup> The *Gulf Oil* court considered the dual purpose of the documents and determined that the company did not prepare the documents "in anticipation of litigation."<sup>145</sup>

This decision indicates that documents created with the dual purpose of helping business planning and assisting litigation are not entitled to work product protection.<sup>146</sup> This decision eliminates the protection a business should have when planning for its future, or its survival. Under this narrow reading of the work product doctrine, businesses cannot make sound decisions, based upon legal advice, without the business potentially having to expose the legal advice to an adversary. On the other hand, if the business does not record its thought processes in order to prevent future discovery, the business exposes itself to error due to the lack of documentation. Although this narrow interpretation may limit squabbles during the discovery process, it promotes either piggybacking or less thorough trial preparation. Therefore, *Adlman* is a better standard.

#### B. The Adlman Standard

In *Adlman*, *Sequa Corporation* ("Sequa") contemplated a merger of two of its wholly-owned subsidiaries.<sup>147</sup> Knowing that the merger would trigger a large tax loss and, subsequently, a large tax refund, *Adlman* ordered Arthur Andersen & Co. ("Andersen") to perform an

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<sup>143</sup> 636 F.2d 1028, 1040 (5th Cir. 1981). The court stated that papers created in the course of preparing a person's tax returns are not documents prepared in anticipation of litigation just because there always exists the possibility of the IRS challenging a return. *Id.* The court said to look at the primary motivating purpose behind the creation of the document. *Id.* If the primary purpose was to aid in possible litigation, then the work product protection may attach. *Id.*

<sup>144</sup> *Id.* See also *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

<sup>145</sup> *Gulf Oil*, 760 F.2d at 297.

<sup>146</sup> *Id.* See also *Griffith v. Davis*, 161 F.R.D. 687, 699 (C.D. Cal. 1995). The *Griffith* court held that even though the memorandum was prepared by an IRS agent in preparation for a possible defense, it was also prepared for an internal report and thus does not qualify under the work product doctrine since it would have been prepared if litigation would have been pending or not. *Id.* The *Griffith* decision expressly denies protection for documents created for two purposes even if one of these purposes was litigation. *Id.*

<sup>147</sup> *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998). *Adlman* was an attorney and Vice President for Taxes at *Sequa*. *Id.*

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evaluation of Sequa's planned merger.<sup>148</sup> Andersen's resulting legal analysis contained the likely IRS challenges to the merger and Sequa's tax claim.<sup>149</sup> More specifically, the memorandum contained the applicable statutes, past IRS rulings on these provisions, and possible legal strategies and theories that Sequa could use should litigation ensue.<sup>150</sup> The memo also contained a recommendation as to how to structure the merger.<sup>151</sup> Additionally, the memo contained Andersen's predictions on the outcome of the anticipated litigation.<sup>152</sup> Clearly, Andersen not only prepared this memo for litigation, but it also prepared the memo to allow Sequa to make an important business decision.<sup>153</sup>

Sequa completed the merger of the two subsidiaries based upon the recommendation of Andersen.<sup>154</sup> Shortly thereafter, the IRS began an audit of the restructuring and the requested refund.<sup>155</sup> When Sequa refused to honor a request for the production of the memorandum prepared by Andersen, the IRS issued a summons for that particular document.<sup>156</sup> Adlman refused to comply with the request stating that the work product doctrine protected the memorandum.<sup>157</sup> The district court held that the work product doctrine did not protect the memorandum.<sup>158</sup> The Second Circuit reversed the district court's holding explaining that Rule 26(b)(3)<sup>159</sup> may protect the memo, as the memo may have been prepared "because of the prospect of litigation."<sup>160</sup>

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<sup>148</sup> *Id.* Both Sequa and Adlman expected the IRS to challenge this refund request in court. *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Adlman*, 134 F.3d at 1195.

<sup>153</sup> *Id.* Sequa's memorandum contemplated the tax issues that would arise in litigation when the tax refund was filed. *Id.* Sequa was sure that the decision would result in litigation. *Id.* The company would easily be able to rationalize that this memo would be made because of litigation because had the company not gone forward with the merger, this tax loss would never have been claimed, and the yearly IRS audit of Sequa probably would not result in litigation.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1195-96.

<sup>156</sup> *Id.* at 1196.

<sup>157</sup> *Adlman*, 134 F.3d at 1196.

<sup>158</sup> *United States v. Adlman*, 1996 WL 84502, at \*1 (S.D.N.Y. Feb. 27, 1996). The district court held that the memo in question was not prepared "principally or exclusively" in anticipation of litigation because of the business planning aspects of the memo. *Id.* Thus, the memo could not be protected by the work product doctrine. *Id.*

<sup>159</sup> See *supra* note 4 for the text of Rule 26(b)(3).

<sup>160</sup> *United States v. Adlman*, 134 F.2d 1194, 1204 (2d Cir. 1998).

The Second Circuit remanded the case back to the district court with the instruction to apply the broader interpretation of the work product doctrine.<sup>161</sup>

In analyzing the work product doctrine, the Second Circuit noted numerous reasons as to why the rule should be given a broad reading.<sup>162</sup> Probably its most compelling argument comes from the fact that the text of the rule states that work product protection attaches to documents prepared "in anticipation of litigation."<sup>163</sup> The court indicated that, had the rule drafters intended to limit the rule's coverage just to items prepared strictly for litigation, the language of the text would have read to cover only those documents "prepared . . . for trial."<sup>164</sup> The court also reasoned that the drafters' use of the word "litigation" instead of "trial" confirms the idea that courts should read the rule broadly.<sup>165</sup> The Second Circuit concluded that there is no language in Rule 26(b)(3) that would prevent work product doctrine protection for a document created for both business planning purposes and planning for reasonably anticipated litigation.<sup>166</sup> The court's conclusion is amply supported by the legislative history behind the drafting of Rule 26(b)(3).<sup>167</sup> Therefore, the drafters of the work product doctrine intended for courts to broadly interpret the doctrine, thus protecting more documents from discovery.<sup>168</sup>

Although the *Adlman* court recognized some problems with the circuit split, concerning how broadly to read the work product doctrine, the court ignored three substantial problems. One of the most obvious problems lies in the possibility of "forum shopping."<sup>169</sup> Because corporations may fall under the jurisdiction of several different federal

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<sup>161</sup> *Id.* at 1204.

<sup>162</sup> *Id.* at 1198-1203.

<sup>163</sup> *Id.* at 1198 (quoting from Rule 26(b)(3)). See *supra* note 4 for the full text of the rule.

<sup>164</sup> *Id.* See also notes 60-67 and accompanying text. Also, had the drafters of Rule 26(b)(3) meant to limit the scope of the work product doctrine to only those materials prepared for trial, the word "solely" would have been inserted into the rule.

<sup>165</sup> *Adlman*, 134 F.3d at 1198.

<sup>166</sup> *Id.* at 1198-99.

<sup>167</sup> See *supra* notes 61-68 and accompanying text.

<sup>168</sup> *Adlman*, 134 F.3d at 1198-99. See also *supra* section II. Also, had the drafters of Rule 26(b)(3) meant to keep out documents with a dual purpose, the rule would have stated that the work product doctrine protects those documents *solely* prepared in anticipation of litigation.

<sup>169</sup> Forum shopping occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).



circuits, a savvy attorney will investigate the various discovery standards among the available jurisdictions.<sup>170</sup> The requesting attorney will likely opt for the circuit adhering to the narrower reading of the work product doctrine so as to obtain more documents during discovery. This possibility of forum shopping hinders proper planning by the corporation's attorneys, as they may not know which standard applies. To relate this back to *Adlman* and to the hypothetical company, had the IRS filed the suit in any federal circuit using the narrow interpretation of the work product doctrine, the IRS would have obtained the memorandum and both companies would be left virtually defenseless.<sup>171</sup>

Another problem stemming from the split among the federal circuits relates to an attorney's preparation for trial. The *Adlman* court recognized the fact that much of what attorneys write down in preparation for a business decision that could result in litigation may go unwritten under the narrower reading because attorneys may have to give the adversary the legal theories and strategies of a case.<sup>172</sup> Such an interpretation decimates the primary purpose of the work product doctrine, which is to provide attorneys with the freedom to "consider and write their strategy and impressions."<sup>173</sup> Effective business planning could suffer. Without this protection allowed under *Adlman*, a risk

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<sup>170</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (indicating that as long as a company has some minimum contact with a state that does not violate the notions of fair play and substantial justice, the federal courts of that state can exercise personal jurisdiction over the company). The "Shoe test" would allow a plaintiff to bring a business into a federal district court that has both personal jurisdiction over the company and a liberal discovery rule. For example, if the second circuit and the fifth circuit could both have jurisdiction over a business, a smart plaintiff would bring suit in the fifth circuit in order to employ the narrower interpretation of the work product doctrine. This forum shopping could leave a company significantly disadvantaged if it involved the type of planning like that of Davidson Enterprises, the hypothetical company in the introduction.

<sup>171</sup> This is limited, of course, to those jurisdictions where the corporation or business is deemed to be under the subpoena powers of a particular district court.

<sup>172</sup> *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), quoted in *United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998). "Neither the interests of clients nor the cause of justice would be served . . . if work product were freely discoverable." *Id.*

<sup>173</sup> Robb C. Adkins, Note, *Protection of Accountant Documents and the Attorney-Client Privilege and Work Product Doctrine: Bernardo v. Commissioner*, 49 TAX LAW. 949, 957 (1996). See also *Bernardo v. Commissioner*, 104 T.C. 677 (1995) (holding that the documents in question were created with a reasonable anticipation of litigation because a piece of art that was appraised by an advisory panel was deemed to be worth a substantially smaller amount than was claimed under a charitable deduction).

adverse attorney may not be as thorough in documenting research or strategy in light of the uncertainty over what is discoverable.<sup>174</sup>

Arguably the biggest problem for businesses in the federal circuits using the narrower reading of the doctrine lies in the fact that some business planning and decisions might not be premised on thorough research. If a business knows that internal memoranda may be available to the business' adversaries through discovery, the business may not create the documents, which could result in poor decision making. The *Adlman* court considered three different examples of when the narrower reading could hurt a business planning for its future.<sup>175</sup> The first example introduces facts similar to the *Adlman* case:

A company contemplating a transaction recognizes that the transaction will result in litigation; whether to undertake the transaction and, if so, how to proceed with the transaction, may well be influenced by the company's evaluation of the likelihood of success in litigation. Thus, a memorandum may be prepared in expectation of litigation with the primary purpose of helping the company decide whether to undertake the contemplated transaction.<sup>176</sup>

The *Adlman* court stated that the work product doctrine should protect this memorandum.<sup>177</sup> Under the Fifth Circuit's inflexible rule, however, the memorandum probably would be discoverable despite the memorandum being an attorney's opinion work product. This is because the memorandum has the dual purpose of preparation for litigation and for business planning that the Fifth Circuit does not allow.<sup>178</sup> A second example that the court set forth is the following:

A company is engaged in, or contemplates, some kind of partnership, merger, joint undertaking, or business association with another company; the other company reasonably requests that the company furnish a candid assessment by the company's attorneys of its likelihood of success in existing litigation. For instance, the

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<sup>174</sup> *Bernardo*, 104 T.C. at 677.

<sup>175</sup> *United States v. Adlman*, 134 F.3d 1194, 1199-1200 (2d Cir. 1998).

<sup>176</sup> *Id.* at 1199.

<sup>177</sup> *Id.*

<sup>178</sup> *See United States v. Gulf Oil Corp.*, 760 F.2d 292, 297 (Temp. Emer. Ct. App. 1985).

company's bank may request such a report from the company's attorneys concerning its likelihood of success in an important litigation to inform its lending policy toward the company.<sup>179</sup>

Again, the *Adlman* court would protect this type of document, while the narrow reading of the work product doctrine would not.<sup>180</sup> The *Adlman* standard protects these types of documents because the documents disclose an attorney's most intimate thoughts and strategies.<sup>181</sup> Finally, the third example introduced in *Adlman* indicates that the following circumstances would enjoy protection from discovery under the work product doctrine:

A business entity prepares financial statements to assist its executives, stockholders, prospective investors, business partners, and others in evaluating future courses of action. Financial statements include reserves for projected litigation. The company's independent auditor requests a memorandum prepared by the company's attorneys estimating the likelihood of success in litigation and an accompanying analysis of the company's legal strategies and options to assist it in estimating what should be reserved for litigation losses.<sup>182</sup>

Like the previous two examples, these writings would enjoy protection under the *Adlman* standard, but do not enjoy protection under the *Gulf Oil* standard. These examples share the *Adlman* court's idea that a document can have a dual purpose and yet still be protected from discovery by the work product doctrine if attorneys are reasonably expecting litigation at the time of the document's creation.<sup>183</sup> The court

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<sup>179</sup> *Adlman*, 134 F.3d at 1199-1200.

<sup>180</sup> *Id.* at 1200.

<sup>181</sup> *Id.* at 1199. The judicial reasoning advocated in this Note would not grant work product protection to this document. See *infra* section IV. This is too broad of a reading of the rule because the documents that are mentioned in the second hypothetical do not have the dual purpose of assisting in litigation and assisting in making a business decision. In the hypothetical, the documents are solely used for a business decision. Although such documents may include our attorney's mental impressions, such a reading seems to stretch the work product doctrine past its intended boundaries.

<sup>182</sup> *Adlman*, 134 F.3d at 1200.

<sup>183</sup> *Id.* at 1202. The *Adlman* court indicated that the document does not lose its protection under the work product doctrine just because it was created to assist in decision making by a company. *Id.* The court said, however, that a document would lose its protection if it

still acknowledges the fact that a document should not receive protection if it was produced in the normal activities of the business, or if the document would have been created in the same form regardless of the pending action.<sup>184</sup> Instead, the focus should be on whether an attorney created the document because of anticipated litigation.

Certainly, the planning implications of a business can change depending on which federal circuit court may have jurisdiction over the company. By allowing companies like Sequa and the hypothetical Davidson Enterprises to protect documents with a dual purpose, however, courts would allow businesses to plan for their futures without offending the premise behind the work product doctrine. Forward-thinking companies should not be punished via intrusive discovery. Unfortunately, some federal circuits do not subscribe to this reasoning. What is considered to be protected in *Adlman*, because the business is in the Second Circuit, might be discovered in the Fifth Circuit because the Fifth Circuit uses the more restrictive "in anticipation of litigation" standard.<sup>185</sup> This discrepancy disadvantages those companies present in the jurisdictions reading the work product doctrine narrowly. It also greatly disadvantages companies that are "present" in multiple jurisdictions. These various interpretations of the rule, as evidenced by the split among the federal circuits, illustrate why the following proposed judicial reasoning is necessary for proper business planning and for the work product doctrine in general.

#### IV. JUDICIAL TEST FOR THE APPLICABILITY OF THE WORK PRODUCT DOCTRINE

Documents that are prepared solely for litigation purposes currently are eligible for protection under the work product doctrine.<sup>186</sup> Documents containing the thoughts or opinions of the attorney are

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was prepared in the ordinary course of business or it would have been created in a similar form regardless of the litigation. *Id.* See also WRIGHT ET AL., *supra* note 125.

<sup>184</sup> *Adlman*, 134 F.3d at 1202 (citing *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982)).

<sup>185</sup> See *United States v. Gulf Oil Corp.*, 760 F.2d 292, 297 (Temp. Emer. Ct. App. 1985). The court ruled that the documents containing legal opinions about the financial implications of pending litigation were prepared for an accounting firm and thus not created in anticipation of, or principally for, litigation. *Id.*

<sup>186</sup> *Id.* at 296. See also FED. R. CIV. P. 26(b)(3), *supra* note 4; *Adlman*, 134 F.3d at 1198.

protected to an even greater extent.<sup>187</sup> But, there is not a clear standard that applies to documents that are prepared to make a business decision that may have litigious consequences.<sup>188</sup> Such a document will typically contain opinions of counsel concerning what issues may come up in litigation, how to defend the company against the claims, and potential affirmative defenses that may be raised once the lawsuit commences.<sup>189</sup> Although some federal circuits do not apply the work product doctrine to documents that were created with a dual purpose, the doctrine is capable of protecting documents or internal memoranda created with a dual purpose when litigation may reasonably result from the business decision.

To grant work product protection for dual purpose works, courts should conduct a two-step analysis. Courts must first determine whether an attorney created the work product for pending litigation or litigation that was reasonably expected. Such a determination revolves around whether litigation has resulted from substantially similar business decisions. Documented examples of litigation should be presented. By limiting eligibility to this type of work product, Rule 26(b)(3) is not offended.

Next, if a court determines that litigation was reasonably expected as a result of the business decision, it must then determine the reason behind the creation of the document. Documents created out of normal business practices are not protected by the work product doctrine because they are not created for pending or future litigation. For example, if a memorandum is a regular report of pending litigation that updates employees as to how litigation is progressing, it is not a document created for litigation; but instead, a document that is created in the normal business practice. Therefore, a court must determine if the document would have been created in its same, or substantially similar form, in the absence of litigation. If the court finds that the documents would not have been created in its current or similar form but for potential litigation, then the work product doctrine may apply to the document. If a document raises defenses or plausible issues that the

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<sup>187</sup> Courts give opinion work product greater protection so that opposing attorneys cannot easily get into the mind of their adversary. Courts do not want a lawyer borrowing the wits of an adversary. See *supra* notes 86-89 and accompanying text.

<sup>188</sup> *Circuit Split Roundup*, 66 U.S.L.W. 2597 (1998). About half of the federal circuits apply the broader reading of the work product doctrine as interpreted by *Adlman*. *Id.* This broad reading allows a business some leeway when planning its future.

<sup>189</sup> *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

court may confront as a result of a specific business instance, the work product doctrine does not automatically attach. If no reasonable expectation of litigation exists, granting work product protection in such an instance would offend the premise of Rule 26(b)(3). In addition, a document does not automatically gain protection just because an attorney, or agent of an attorney, created it. Finally, the document must be created to assist in future or pending litigation.

Thus, for the work product doctrine to protect a document, the following test should be met: 1) the work product must be created because of pending or reasonably expected litigation; and, 2) but for the pending or reasonably expected litigation, the work product would not have been created in that, or a substantially similar, form. If a document meets this standard, the work product doctrine may attach. If it does attach, opposing counsel could only obtain the document upon the showing of substantial need and undue hardship.

Applying this rationale to the hypothetical Davidson Enterprises, its memo would receive protection under the work product doctrine. The corporate legal department reasonably expected to have its substantial tax refund challenged for two reasons. First, the IRS audited the company annually. Second, the IRS always challenges refunds of the size that Davidson plans to claim. Since litigation is reasonably expected, the next determination is whether the legal department, but for the pending or reasonably expected litigation, would have created the memorandum in the same or a substantially similar form. Davidson's attorneys will argue, successfully, that the department created the memo solely for the predicted IRS challenge. They would argue that since the memo included the potential issues of the refund and merger and the likely arguments that the IRS would make, the memo was created because of the anticipated litigation. Because Davidson's memo meets both prongs of the model judicial test as laid out by this Note, the memo deserves protection under the work product doctrine.

## V. CONCLUSION

A broad reading of the work product doctrine would allow businesses such as Davidson Enterprises to plan for its future without exposing itself to what could be severely damaging discovery. A business should be able to thoroughly plan for its future without fear of having to turn over important materials which helped the company make a decision if the company reasonably expected the decision to result in litigation. By granting work product protection to a company's

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**dual purpose memorandum that attorneys prepared after litigation was reasonably anticipated, the company can protect important internal memoranda from being discovered by opposing counsel while not offending the premise of the work product doctrine.**

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